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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 83

PALACE CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 99-105) is reported at 110 F. Supp. 476.

JURISDICTION

The judgment of the Court of Claims was entered on March 3, 1953 (R. 104-5). The petition for a writ of certiorari was filed on May 20, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in a suit on Government contracts containing standard dispute clauses, the Court of

Claims properly granted the Government's motion for summary judgment on the grounds that the contract breaches relied upon by petitioner involved only questions of fact and that, accordingly, the contracting officer's denial of the same claims, affirmed by the head of the department, were final.

CONTRACT PROVISIONS INVOLVED

Pertinent portions of the contract are set forth in the Appendix, *infra,* pp. 12-14.

STATEMENT

This action was based on alleged breaches of two contracts between petitioner and the Government whereby petitioner had agreed to manufacture, transport and erect 1234 prefabricated houses at sites in Akron and Cleveland, Ohio, and Detroit, Michigan (R. 1, 2). Each contract contained a standard disputes clause (see Appendix, *infra,* pp. 12-13), whereby all questions of fact arising under the contract were to be submitted to the contracting officer whose decision, upon affirmance by the designated department head, was to be final. All grievances included in this action had previously been submitted, in accordance with the contract procedure, to the contracting officer and, upon his rejection, to the head of the department who, after appropriate hearings and consideration, affirmed the contracting officer's decision (R. 6, 10, 11-12). Subsequently, petitioner submitted all claims for reconsideration under the disputes clause and again, after due review by both contracting officer and department head, the claims were denied (R.

34-41). All claims were resubmitted to the head of the department a second time and once more the previous rulings were reaffirmed (R. 43-49). After rejection of its claims under the disputes article, petitioner commenced this action in the Court of Claims.

Petitioner's claims, set forth in five counts of its complaint (R. 1-12), fall into four main categories:

(a) The contractor had guaranteed each unit "against defective material and workmanship, including * * * roof leaks due to causes other than physical abrasion or tearing * * *" for one year from the date of final acceptance by the Government of each unit (R. 10). Petitioner alleged that the Government represented to it that damage to panels, electrical fixtures and other installations were caused by leaking roofs which, in turn, were the result of defective material and workmanship; and that, under its guarantee, petitioner was responsible for repair of those conditions (R. 1-2, 10-12.) Petitioner alleged it was compelled to make repairs to the extent of $56,477.21, although it claims the conditions complained of were not due to roof leaks but were caused mainly by condensation, high humidity and the nature of the material specified due to wartime conditions (R. 11). Also alleged was a wrongful withholding of $32,504.26 of the contract price retained by the Government to pay for the remaining repairs of the same type which petitioner refused to make (R. 1-2).

(b) Petitioner asked $78,404.96 for extra costs due to extraneous materials encountered in the course of excavation (R. 5). These materials con-

sisted of concrete, brick, stone, steel, etc. requiring the use of dynamite, handbars, air tools and torches for their removal and that the contour of the ground required additional skirting, higher berms and because of greater foundation depth added plumbing was necessary (R. 4). Three change orders had been issued (R. 5) allowing petitioner $46,117.23 for soil conditions and extra depth of foundations. Subsequently, petitioner claimed this $78,404.96 in extra costs to cover carpenter rate increases, extra earth berms, and excess costs of foundations, sewer lines and water lines. This claim was denied. (R. 5-6.)

(c) Damages were also sought by reason of various delays allegedly caused by the Government. Failure of the Government to provide a complete delivery schedule; failure to provide suitable sites and the lack of their availability; issuance and then changing notices to proceed; cancelling and changing site locations; scattering sites over wide areas instead of grouping them as originally intended; and directing and compelling petitioner to operate at such times and under such circumstances and conditions that petitioner's costs were increased substantially, make up the substance of this claim. (R. 8.)

(d) Petitioner also claimed damages by reason of the Government's failure to issue exemption certificates for federal excise taxes, forcing petitioner to pay its suppliers and the United States Treasury Department $12,064.91 (R. 3). Although no specific provision of the contract provided for

the Government's issuance of such certificates, petitioner contended that the requirement must be deemed part of the contract by virtue of prior negotiations, custom and practice between the parties (R. 2).

The Government moved for summary judgment as to the entire complaint (R. 13-20). On the authority of this Court's decision in *United States* v. *Wunderlich,* 342 U.S. 98, the motion was granted by the Court of Claims except as to that count based upon the claimed tax exemption (R. 104-105), as to which further proceedings were ordered.

ARGUMENT

1. *United States* v. *Wunderlich,* 342 U.S. 98, disposes of petitioner's contention on the merits.[1] Petitioner's effort to avoid the rule of that case by arguing that questions of law are presented is without merit. Analysis of the actual issues in the case demonstrates that nothing more than questions of fact, plainly within the scope of the standard disputes clause, are presented.

(a) Petitioner contends that the moisture conditions causing the damage to installations in the units were not due to leaky roofs which were the result of faulty material or workmanship, as maintained by the Government (R. 31-2, 88), but were the result of condensation and the high humidity of the areas where the units were located, coupled

[1] See, also, *Kihlberg* v. *United States,* 97 U.S. 398; *Sweeney* v. *United States,* 109 U.S. 618; *United States* v. *Moorman,* 338 U.S. 457.

with the nature of the material specified due to wartime conditions (R. 11). It is apparent therefore that a question of fact as to the cause of the moisture conditions was involved since liability for roof leaks due to defective material or workmanship is conceded by petitioner (R. 10).

(b) Only questions of fact are present in petitioner's claims for extra costs because of extraneous conditions encountered in the erection and installation of the units. Article 4 of the contract (see Appendix, *infra,* p. 12), which deals with changed conditions, provides that modification of the contract to provide for any increase or decrease of cost and/or difference in time resulting from such conditions as are alleged to have been encountered in this case, shall be made by the contracting officer with the department head's approval. The situation in the present case was thus anticipated by the parties and adequate provision made. Furthermore, it is purely a question of fact whether there are "conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications."

(c) Petitioner's contention with regard to damages for delay may be similarly treated. The argument (Pet. 7) that "constructive conditions" in the contract were thus breached by the Government runs counter to the decisions of this Court in

Crook Co. v. *United States,* 270 U.S. 4, *United States* v. *Rice,* 317 U.S. 61, and, most recently, *United States* v. *Howard P. Foley Co., Inc.,* 329 U.S. 64. There, in rejecting a similar contention by a contractor and requiring an express contract provision to impose liability upon the Government for delays, this Court stated (329 U.S. at 69):

> This contract, like the others [*Crook* and *Rice*] shows that changes and delays were anticipated and provided for. The question on which all these cases turn is: Did the Government obligate itself to pay damages to a contractor solely because of delay in making the work available? We hold that it did not for the reasons elaborated in the *Crook* and *Rice* decisions.

The fact situation in the present case coupled with the terms of this contract inevitably leads to a result identical with *Crook, Rice* and *Foley.* Only Article 9 (see Appendix, *infra,* p. 14), the delays-damages clause, offered relief to the contractor for delays caused by the Government. That relief was an extension of time on proper application by the contractor through the contracting officer and department head whose decision was to be final. In the *Crook* case, referring to a similar clause, this court stated (270 U.S. at 6): "* * * which [the delays clause] though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do." The *Foley* decision applies the same principle.

Petitioner attempts to avoid the *Crook* and *Foley* decisions on the basis of later Court of Claims' rulings which impose liability where the delay was attributable to lack of diligence or some other fault on the part of the Government. We do not concede the validity of this distinction in view of the rationale underlying *Crook, Rice* and *Foley*. It is our position that every question with regard to delay, by virtue of the provisions of Article 9, falls within the purview of the disputes clause procedure to which petitioner is contractually bound. However, even if the distinction which the Court of Claims decisions have occasionally applied be taken *arguendo* as sound, petitioner cannot succeed. For implicit in the Court of Claims action in sustaining the Government's motion for summary judgment is the decision, on the basis of the pleadings, depositions, admissions and affidavits presented, "that there is no genuine issue as to any material fact" (Rule 51 (c), Rules of Court of Claims. It is apparent, therefore, that the Court of Claims, which itself utilizes the distinction on which petitioner seeks to rely, has found that, on the facts of the present case, there was no occasion for its application.

2. Petitioner attempts (Pet. 12) to evade the *Wunderlich* rule by a contention that the Act of July 10, 1952, the Department of Defense Appropriations Act of 1953, Title VI, Section 635, evinces a congressional intent to nullify Article 15 not only with regard to contracts expending money under that Act but also with regard to all contracts en-

tered into by the Government at any time and under any appropriations act. But the statute on its face offers adequate rebuttal. The section of the Act referred to is *sui generis*. No reference is made to contract expenditures under any other appropriations act and no retroactive application is provided. As the instant contract was entered into in 1943 with the National Housing Agency, the Defense Appropriations Act of 1953 can have no conceivable impact.

3. Finally, there is a question whether the order of March 3, 1953—granting the Government's motion for summary judgment as to four counts of the complaint, overruling that motion as to the remaining count and continuing the case for trial with reference to that count (R. 104-105)—is a judgment from which certiorari may be sought by the petitioner at this time. See 28 U.S.C. 1255.

Rule 51 of the Rules of the Court of Claims, under which the motion for summary judgment was granted, is, so far as here material, identical with Rule 56 of the Federal Rules of Civil Procedure. Under the latter rule, it is well settled that orders partially granting motions for summary judgment are not appealable but are, rather, pre-trial adjudications that certain issues in a particular case shall be deemed established for the trial of the case. See *Leonard* v. *Socony-Vacuum Oil Co.*, 130 F. 2d 535 (C.A. 7); *Biggins* v. *Oltmer Iron Works*, 154 F. 2d 214 (C.A. 7); 3 Moore's *Federal Practice* (1st ed.), §56.09. Although under Rule 54(b) of the Federal Rule of Civil Procedure a district court has power

to separate several claims in one action upon a determination of the issues material to each claim and to enter separate judgments, which then become appealable judgments, see 3 Moore's *Federal Practice* (1st ed.), §56.09, no such rule is contained in the Rules of the Court of Claims. On the contrary, the specific provisions of Rule 54(b) emphasize the general non-appealability of orders which partially grant motions for summary judgment and negative the need for creation of any comparable power by implication. Rule 54(b) permits an exception only upon the express direction by the district judge for the entry of a final judgment on part of a case, after making appropriate findings. Here, the order entered by the Court of Claims not only falls short of providing a similar basis for implying the entry of final judgment but, on the contrary, plainly shows that the order entered was of an interim nature. The court directed that the Government's "* * * motion for summary judgment is granted as to Counts I, III, IV and V, and overruled as to the matters involved in Count II. The case will be referred to a commissioner of the court for further proceedings limited to the claims set out under Count II of the petition." (R. 104-105.)

CONCLUSION

For the foregoing reasons the decision of the court below is correct and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1953.

APPENDIX

The pertinent parts of Contract HA (MICH 20213)cph-105 and Contract HA (MICH 20213) cph-102 are as follows:

> Article 4—Changed Conditions: Should the Contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the Contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions. [R. 4.]
>
> Article 12 of Contract 102 is as follows: Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclu-

sive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance. [R. 14.]

Article 15 of Contract 105 is as follows: Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed. [R. 14-15.]

Article 20. Guarantee — The Contractor shall guarantee each Palace Mobile Expansible House unit against defective material and workmanship, including, but without limitation, excessive spring sets; cracking and sagging of frame members; loosening and breaking of rivets; tearing and cracking of sheet metal stock and welds; rusting of exterior metallic surfaces resulting from inferior or improper rust resistant finishes; failure of paint to withstand cracking, peeling, or excessive checking; roof leaks due to causes other than physical abrasion or tearing; and cracking, splitting, warping, and the rotting of wood structures. This guarantee shall be effective for a period of one year from the date of final acceptance of each unit by the Government. There shall be no final acceptance by the Government of any Palace Mobile Expansible

House unit until each such unit is installed and erected at the site designated therefor. [R. 10.]

Article 9. (a) Delays—Damages. . . .; Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to . . . acts of the Government . . ., if the contractor shall within 10 days from the beginning of any such delay . . . notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto. [This will be found in the certified record on file with this Court.]

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